



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/CLC:CBsb100723

10 July 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: shounok.chatterjee@lawcouncil.au

Dear Dr Popple,

Review of Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (**Bill**). The Law Society's Human Rights and Criminal Law Committees have contributed to this submission.

Conduct intended to discriminate and vilify has a profound impact on affected individuals and communities. Further, wider societal harm results from the display of and trading of hate symbols because of the way such imagery is used by nationalist and racist groups to raise their profile, recruit new members and intimidate vulnerable groups.

In our view, it would be preferable in the first instance for the Government to consider ways to strengthen racial vilification laws in relation to hate symbols and insignia. We support strengthening and greater harmonisation across the State and Commonwealth anti-discrimination and anti-vilification regimes to ensure protections for those individuals and groups in the community who are vulnerable to discrimination and vilification. Criminalisation will not fully address the highly complex and nuanced issues around radicalisation and violent extremism nor respond fully to the discrimination faced by certain communities.

We have made comments on some of the difficulties of the proposed provisions in Schedules 1 and 2 below.

Drafting of provisions in Schedule 1 and 2

As a general comment, we consider the drafting of these provisions in the Bill is overly complex. This may impact public understanding and awareness, cause difficulties in policing, and ultimately reduce the intended deterrent effect of the legislation.

We note that the offences concerned with the display of Nazi symbols in the *Crimes Act 1900* (NSW) and the *Summary Offences Act 1966* (Vic), including the defences, are set out with greater brevity and clarity.

Scope of 80.2E – Meaning of *prohibited symbol*

Proposed section 80.2E is extremely narrow in scope as it refers only to the Islamic State flag, the *Hakenkreuz*, and the double-sig rune. Modern Nazi organisations use a wide variety of symbols, from the historical (such as the *Sonnenrad*) to the coded-numerical (such as 1488). Further, they have been shown to be adept at moving quickly to new symbols when old ones are outlawed. In addition, such extremist groups do not limit themselves to the use of hateful insignia, but also adopt salutes and phrases associated with historical, extremist organisations (e.g., the Nazi party) to further discriminate against and vilify vulnerable groups.

Any definition which proscribes specific individual symbols will likely cause difficulty in the situations identified above. The approach taken by NSW in s 93ZA of the *Crimes Act 1900* (NSW) to not define ‘Nazi symbol’ goes some way to addressing this problem by leaving the question of whether a particular symbol is a ‘Nazi symbol’ to the trier of fact.

The undefined approach may also reduce the risk of legitimate use of certain symbols and insignia from being caught by the ‘so nearly resembles’ test as the prosecution would be required to prove beyond reasonable doubt that a symbol is, in fact, a hate symbol.

Section 80.2K – Directions to cease display of prohibited symbols in public

Proposed s 80.2K(1) provides a police officer with a new power to direct a person to cease display of a prohibited symbol in public. The police officer issuing the direction is required to suspect, on reasonable grounds, that the conduct involves dissemination of ideas based on racial superiority or racial hatred; or that the conduct could incite another person or a group of persons to offend, insult, humiliate or intimidate a person or a group of persons because of their race.

There is the potential for these provisions to give rise to misunderstandings, most particularly in relation to the Islamic State Flag. We understand the flag’s colour (black) and text (*shahadah*), which has been co-opted by the terrorist organisation for its purposes, are of cultural and religious significance to many people of the Muslim faith, who may choose to display similar symbols.¹ For the reasons set out above, police officers without relevant language skills and cultural competency may unintentionally target members of the Muslim community in their expression of culture and religious observance in giving directions of this nature.

The provisions of s 80.2K of the Bill extend beyond public display of hateful insignia targeted at a group of persons on the basis of race and include ‘a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin’ (see s 80.2K(6)(b)). However, we are concerned that this provision is overly prescriptive. For example, it would appear to exclude groups of persons regularly the target of discrimination and vilification by extremist groups, in particular members of the LGBTQI+ community.

Reasonable, necessary and proportionate

From a human rights perspective, while the Bill places restrictions on a person’s freedom of expression and association (Articles 19 and 22 of the *International Covenant on Civil and Political Rights* (ICCPR)), the legislation also responds to Australia’s commitments under Article 4 of the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) and Articles 20 and 26 of the ICCPR.

We consider it unlikely that criminalisation of certain hate symbols offends against freedom of expression. In the context of European human rights jurisprudence, the display of hateful

¹ Dr Raihan Ismail, Submission No 15 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023* (23 June 2023) 3.

symbols/posters etc does not attract the protections of Article 10 of the *European Convention on Human Rights (ECHR)* (freedom of expression) and cases on the matter have been dismissed under the abuse clause of Article 17 of the ECHR. See, for example the case of *Norwood v The UK*, App. No. 23131/03 (2004).

However, we agree with the Law Council's proposal, as set out in its supplementary submission to the inquiry into extremist movements and radicalism in Australia, that a comprehensive 'justice impact assessment' would assist in determining whether the enactment of these offences at the Commonwealth level is reasonable, necessary and proportionate. Such an approach is consistent with the recommendation of the UN Committee of the Elimination on Racial Discrimination (General Recommendation No 35) which reads as follows:

The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.²

We consider it would have been prudent to review Commonwealth anti-discrimination and anti-vilification regimes to ensure protections for those individuals and groups in the community who are vulnerable to discrimination and vilification before moving to criminalisation of select symbols. Such endeavours would be consistent with giving proper effect to Australia's obligations under the ICERD as well as helping to determine from a holistic perspective whether criminalisation is necessary within the legal framework.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,



Cassandra Banks
President

² General Recommendation No. 35: Combating Racist Hate Speech, UN Doc. CERD/C/GC/35, 26 September 2013 (adopted by CERD at its 83rd session (12–30 August 2013)), also in UN Doc. A/69/18, annex VIII.